No: 93-230

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

TIMOTHY R. MCGOWAN,
PETITIONER,
v.
MARK J. CROSS and
CROSS, CLAYTON & ASSOCIATES,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOW WRIT OF CERTIORARI

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Petitioner,
pro se.

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Date: August 12, 1993

92 pp

QUESTIONS PRESENTED

1. Whether affidavits proven to have false and meritless statements and the unsubstantiated pleading of counsel constitute proof of fair use as defined by this Honorable Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) and embodied in 17 U.S.C. § 107.

2. Whether the commercial nature of the infringement and the profit of the infringer bar fair use as defined by this Honorable Court

in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) and embodied in 17 U.S.C. § 107.

3. Whether the Appellate Court is obliged to reverse a lower court ruling found to be based on false and meritless statements.

4. Whether the Appellate Court erred in reviewing the case *de novo*.

5. Whether the Court of Appeals for the Fourth Circuit erred in issuing an order in conflict with recent rulings by the United States Court of Appeals for the Third, Sixth and Ninth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix at APP. 1. The opinion of the District Court was rendered at a hearing for cross motions for Summary Judgment on March 27, 1992 and the Judge's opinion is reproduced

in the Appendix at APP. 22.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 8, 1993. The order of the United States Court of Appeals for the Fourth Circuit denying a rehearing and an *en banc* rehearing was entered on May 18, 1993. The order of the United States Court of Appeals for the Fourth Circuit denying a Motion for Costs and Sanctions was entered on May 21, 1993. The mandate of the United States Court of Appeals for the Fourth Circuit was entered May 25, 1993 making the effective date of the judgment May 25, 1993.

The jurisdiction of this Court is based on Rule 10.1(a) of the Rules of the Supreme Court in that the United States Court of Appeals for the Fourth Circuit has rendered a

decision in conflict with decisions of the United States Court of Appeals for the Third, Sixth and Ninth Circuit; as well as much of the case law on fair use, and has departed from the accepted and usual course of judicial proceedings.

STATUTE INVOLVED

17 U.S.C § 107 provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonographs or by any other means specified by that section, for the purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In

determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

On July 2, 1985 Timothy R. McGowan, Petitioner, purchased a set of copyrighted building plans (technical drawings) from Mike Tecton. Petitioner made substantial modifications to the plans including: creating a new floor plan for the 8'x 12' master bath area, changing the front and back elevations (the way the house looks from the outside), adding and deleting windows, changing the dimensions of windows, and specifying different building materials. Petitioner notified Mike Tecton of the derivative work and paid incremental royalty fees for each copy of the derivative work made. Petitioner created a derivative work, based on the Mike Tecton plans, that was unique and intended for the creation of one, unique single family house. Petitioner proceeded to build a 7,000 square foot house using the modified building plans (hereinafter the "Plans") on real property then jointly owned by Petitioner and his wife.

In the process of building the house the Plans were filed with the County of Fairfax, Virginia. Mike Tecton's copyright marking of the original plans were clearly visible on the Plans filed with the County of Fairfax. The Plans contained no additional copyright marking from Petitioner. A limited number of copies of the Plans (under 20) were distributed by Petitioner to craftsmen for the purpose of obtaining bids to complete work tasks on the house. The Plans were never offered for sale or published. The Plans were unpublished derivative works created by Petitioner.

On September 11, 1989 the title to the real property and all improvements was conveyed from the McGowans to Edwin H. Allen[1]

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[1] Edwin H. Allen is a lawyer and former Congressional staff member for Representative John Dingall. His father, William E. Allen is a partner in Covington & Burling and former clerk to Honorable Supreme Court Justice Earl Warren.

and his wife Wendy L. Allen by order of the Virginia Supreme Court[2]. At the time the title was conveyed to the Allens the house was not complete.

Petitioner offered both to work for the Allens in completing the house and the Plans for a fee.[3] The Allens declined both offers.

The Allens retained Mark J. Cross and Cross Clayton and Associates, the Respondents, to complete the house. Mark J. Cross is the brother of Wendy L. Allen. Cross, Clayton and Associates is a for profit corporation registered in Virginia. The exact nature of

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[2] *Allen v. Lindstrom*, 379 S.E.2d 450, 455 (Va. 1989).

[3] Petitioner admits these facts are not in the record. However, the information was provided to counsel for Respondents in response to Discoveries. "Attorneys, as officers of the court, have the responsibility to present the record with accuracy and candor." *Pinkham v. Sara Lee Corp.*, 983 F.2d 833, (8th Cir. 1992).

the Respondents business arrangement with the Allens was not brought into evidence in the court as the Respondents had no business or financial records under their control relating to the completion of the house.

On, or about November 2, 1989 Respondent Cross requested the County of Fairfax to make twelve (12) copies of the Plans. Respondents used the Plans to; obtain a building permit from Fairfax County, have Petitioner's construction permits transferred to the new building permit, and solicit bids for work to complete the house. Upon completion, the house was immediately offered for sale and rent. The completed house was appraised at over $750,000. The house was never occupied by the Allens.[4]

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[4] Although the offered sale and rental of the house is not in the record, Cross as builder and relative to the Allens was aware of the disposition of the house. "Attorneys, as officers of the court, have the responsibility to present the record with accuracy and candor."

In May of 1990 the Allens and McGowans entered into a settlement agreement resolving all disputes relating to the real property and the physical improvements. The intellectual property rights held by Petitioner as the author of the Plans were not addressed in the settlement agreement even though the Allens and Respondents and copied the Plans six (6) months earlier.

Petitioner became aware of the use of the Plans and filed for Registration of Copyright, as an individual - not jointly with his wife, on January 3, 1990. The Library of Congress granted a Registration of Copyright for the Plans effective January 8, 1990.

Petitioner mailed an invoice for royalties to both the Allens and Respondents. Both parties replied refusing to pay the royalty fees.

Pinkham v. Sara Lee Corp., 983 F.2d 833, (8th Cir. 1992).

On November 29, 1991 Petitioner filed suit alleging infringement of copyright under 17 U.S.C.§ 101.

On March 25, 1992 Respondent Cross submitted an affidavit to the court alleging the Plans were required to complete construction of the unfinished house.

The matter was brought before the district court on cross Motions for Summary Judgment on March 27, 1993. The court ruled that the fact the Plans were required to complete construction of the house created an implied nonexclusive license to use the Plans. The court further ruled that under the circumstances created by the nonexclusive license the use constituted fair use under the law. The court stopped Petitioner from presenting oral arguments against fair use. The district court granted the Respondent's Motion for Summary Judgment. APP. 29.

On April 25, 1993 Petitioner appealed principally on the basis that the Respondent Cross' affidavit contained false and meritless statements; specifically that the Plans were not required to complete construction of the house and that the false and meritless statement was the basis for the district court's ruling. The Court of Appeals for the Fourth Circuit ruled on April 22, 1993. The Court of Appeals for the Fourth Circuit did not address the false and meritless statement, but rather applied the calculus of fair use to the record and found the use to be fair.

On May 3, 1993 Petitioner filed a Petition for Rehearing and a Petition for Rehearing *En Banc* in the Court of Appeals for the Fourth Circuit. Also on May 3, 1993 Petitioner filed a Motion for Sanctions and Costs based on the false and meritless statement pursuant to Federal Rule of Civil Procedure 56 (g). On May 18, 1993 the Court

of Appeals for the Fourth Circuit denied the Petitioner's Petition for Rehearing and Petition for Rehearing *En Banc*. On May 21, 1993 the Court of Appeals for the Fourth Circuit denied the petitioner's Motion for Costs and Sanctions, never addressing the false and meritless statement.

REASONS FOR GRANTING THE WRIT

I.

Whether affidavits proven to have false and meritless statements and the unsubstantiated pleading of counsel constitute proof of fair use as defined by this Honorable Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) and embodied in 17 U.S.C. §

107.

This Honorable Court held in *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) a court is required to apply the four statutory factors identified in 17 U.S.C. § 107 to establish fair use. In *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) this Honorable Court held that "fair use is a mixed question of law and fact." The court has an obligation to weigh the facts presented against the statutory factors. "[T]here can be no 'fair use' of unpublished material" *id.* 551 Unpublished works are afforded greater protection from fair use. The burden of proof rests with the Respondent.

In the case at bar the Respondents presented only an affidavit with false and meritless statements and the unfounded assertions of counsel. No evidence or expert

testimony was presented on the four statutory factors of fair use.

1. **Purpose and Character of Use.**

To establish purpose and nature Respondent claims to be non commercial and to have not profited from the use of the Plans.

To counter this assertion, Petitioner entered into evidence weekly time sheets from Respondents, invoices from Respondents marked paid, and banking statements denoting payments made to Respondents to demonstrate the commercial nature of the use. Respondent Cross claimed to have received a "total gross compensation" Informal Brief of Mark J. Cross and Cross, Clayton & Associates, June 11, 1992, pg. 2. for the work performed. Additional evidence of the commercial nature of the use was not available because on March 27, 1992 Respondents had not answered a

Discovery request for financial information properly filed with the court.

2. Nature of the Copyrighted Work.

Respondents presented no evidence on the nature of the copyrighted work. Counsel for Respondents argued the nature of the work was insignificant and of a factual nature and available publicly. Respondents presented no evidence or expert testimony.

Petitioner presented the prima facia evidence of Registration of Copyright.

3. Amount and Substantiality of the Portion Used.

Respondents make no claim of the amount used, but argue even if 100% if the copyrighted work were used it should not be

the basis for denying fair use.

4. Effects on Market.

Respondent relied on the implied license granted by the false statement of "need for the Plans" to complete the house and the fact that Petitioner and Respondent are not direct competitors.

Respondent also creates a new definition of "use" - arguing that the copying did not decrease the value of the Plans because the portion of the house represented by the modifications had already been built.

On this basis the Court of Appeals granted fair use. The Court of Appeals has set a new, *de minimis* standard to qualify for fair use. Such a standard lets both the nose and the ass of the camel under the protective umbrella of fair use.

While the Executive and Legislative branches of the Government seek to expand copyright and "intellectual property" rights to the world community through the Berne Convention Implementation Act of 1988, the Copyright Infringement Act of 1990 and the General Agreement on Trade and Tariffs (GATT), the Court of Appeals is expanding the applicability of fair use to anyone willing to stand before the Court and bear false witness.

The Court of Appeals for the Fourth Circuit erred in overlooking the duty of the Respondent to prove the use to be fair given the evidence presented.

II.

Whether the commercial nature of the infringement and the profit of the infringer bar fair use as defined by this Honorable Court in *Sony Corp.*

v. Universal City Studios, Inc., 464 U.S. 417 (1984) and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) and embodied in 17 U.S.C. § 107.

Independent of this Honorable Court's finding on the evidence presented is a separate and distinct question of the applicability of fair use to the Respondents.

> In determining whether fair use is an applicable defense, we must dial through the two-pronged analysis contemplated by 17 U.S.C. § 107 (1988). First, we must determine whether the purpose underlying the use committed by the defendant is condoned by the statute. "[F]air use of a copyrighted work ... for purposes

> such as criticism, comment, news reporting, teaching, ... scholarship, or research, is not an infringement of copyright." (17 U.S.C. § 107 (1988)) Although the list of acceptable purposes enumerated in the statute is not exclusive, it is evident that the purpose envisioned by the statute must be of a salutary nature. **If, and only if, the purpose is acceptable, must we determine whether the defendant's use is fair.** *Bellsouth Advertising & Pub. v. Donnelley Inc. Pub.*, 933 F.2d 960 (11th Cir. 1991) (emphasis added).

"The fair use doctrine will not apply absent a significant public interest justifying limits on the copyright holder's rights." *Wolff v. Institute of Elec. & Electronics Eng.* 768 F.Supp. 68 (S.D.N.Y.

1991) *citing Strauss v. Hearst Corp.*, 8 USPQ2d 1835. The actions of Respondent served no public interest, therefore no determination of fair use is allowed.

Fair use "always had to do with the use by a second author of a first author's works" Seltzer, *Exceptions and Fair Use in Copyright*, 24 (1978). Fair use implies some sort of follow on work. Respondents did not create another work, but only used verbatim and in it's entirety the Plans copyrighted by Petitioner.

"To invoke the fair use exception, an individual must posses an authorized copy." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 562-63 (1985). Respondents did not have an authorized copy.

The public has no interest in permitting one company to copy

another company's work. Congress in the 1990 Act has elected to grant certain exclusive rights to the owner of a copyright in a protected work, including architectural works[5]. The public interest will be served by upholding the copyright protection, and preventing pirating of creative energies and resources that are invested in protected works. *Value Group, Inc. v. Medham Lakes Estates, L.P.*, 800 F.Supp. 1234 (D.N.J. 1992). quoting *Apple Computer*, 714 F.2d at 1254.

Once the question of public interest has been affirmed, which it has not in the case at bar, application of fair use is an "equitable rule of reason". *Sony Corp. of America v.*

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[5] Petitioner recognizes the Plans are technical drawings, not architectural plans. However, the same rule of law applies to both forms of copyrighted works.

Universal City Studios, Inc., 464 U.S. 448 (1984). Each case requires a particular determination whether a specific use is fair. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549. This Honorable Court held in *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) a court is required to apply the four statutory factors identified in 17 U.S.C. § 107 to establish fair use.

1. **Purpose and Character of Use.**

The Court of Appeals relied on the "intent" of Cross in copying the Plans. "The defendant's intent is simply not relevant: The defendant is liable even for 'innocent' or 'accidental' infringement." *Pinkham v. Sara Lee Corp.*, 983 F.2d 829 (8th Cir. 1992). "Even an innocent infringer is liable for infringement." *id.* ***See also Fitzgerald***

Publishing Co. v. Baylor Publishing Co., 807 F.2d 1110 (2d Cir.1986); *Nationwide Educ. Dev. Corp. v. Rex Communications, Inc.*, 16 U.S.P.Q.2d 1564, 1990 WL 64595 (S.D.N.Y.1990). *Columbia Broadcasting Sys. v. American Soc'y of Composers, Broadcasters & Publishers*, 620 F.2d 930, 939 (2d Cir.1980) *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (1978). "[A]s between two innocent parties (i.e., the copyright owner and the innocent infringer) it is the latter who should suffer since he, unlike the copyright owner, either has an opportunity to guard against the infringement by diligent inquiry, or at least the ability to guard against liability for infringement by an indemnity agreement from his supplier or by an 'errors and omissions' insurance policy." Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 13.08 at 139 (1992).

"Fair use presupposes 'good faith' and 'fair dealing'." *Harper & Row Publishers,*

Inc. v. Nation Enterprises, 471 U.S. 562-63 (1985). *See also Key Maps, Inc. v. Pruitt*, 470 F. Supp. 34 (1978). Respondent acted in bad faith by seeking the copies of the unpublished Plans from an unauthorized source.

Respondent denied the use of the Plans. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, March 23, 1992, pg. 3. "[R]elevant to the "character" of the use is the propriety of the defendant's conduct. Characterizing the fair use doctrine as "equitable," it has been held that defendant's unjustified denial of its use of the plaintiff's work is a factor militating against permitting defendant to claim fair use." Nimmer, *The Law of Copyright*, § 13.05[A] at 13-102.16 17.

"Mere reproduction of a work in order to use it for its intrinsic purpose may not be

considered fair use." *id* at 13-102.11. Respondents copied the Plans and used them to complete the identical house Petitioner began constructing. A more clear definition of use for it's intrinsic purpose would be difficult to find.

"The crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price" *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 562 (1985) U.S. (1985). Respondent copied the Plans without paying royalty fees and was paid for the work of construction manager while completing the house. "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of America v. Universal City*

Studios, Inc., 464 U.S. at 451.

"The question under factor one is the purpose and character of the use, not of the alleged infringer." *Lish v. Harper's Magazine Foundation*, 807 F.Supp. 1101 (S.D.N.Y. 1992).

"Fair use distinguishes between a true scholar and 'a chiseler who infringes a work for personal profit.'" *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 563 (1985) quoting *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d, 94. Respondent does not meet the first statutory criteria for fair use.

2. Nature.

The Court of Appeals found the Plans, for which a Registration of Copyright was granted, to be a work of diligence and factual nature thereby finding for the Respondent. "While

originality of work is one element of copyright validity, the copyright certificate itself provides prima facie evidence of some originality." *Midway Mfg. Co. v. Bandai-America*, Inc. et al., 546 F. Supp. 139.

"The copyright is limited to those aspects of the work -- termed 'expression' -- that display the stamp of the author's originality. Creation of a nonfiction work, even a compilation of pure fact, entails originality." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 547 (1985). *See also Schroeder v. William Morrow & Co.*, 566 F. 2d 3 (CA7 1977) *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

It has long been established that telephone directories, lists of names and phone numbers are copyrightable because the correlation between the two facts is a

creative act. *See Leon v. Pacific Tel. & Tel. Co., supra; Cincinnati & Suburban Bell Tel. Co. v. Brown*, 44 F. 2d 631 (S.D. Ohio 1930); *Southern Bell Tel. & Tel. Co. v. Donnelly*, 35 F. Supp. 425 (S.D.Fla. 1940); *Sammons v. Larkin*, 38 F. Supp. 649 (D.Mass. 1940), *modified on other grounds*, 126 F.2d 341 (1st Cir. 1942); *American Travel & Hotel Directory Co. v. Gehrig Publishing Co.*, 4 F.2d 415 (S.D.N.Y. 1925); *Hartford Directory & Publishing Co.*, 146 F. 332, *damages awarded*, 148 F. 470 (C.C.D. Conn. 1906); *Social Register Association v. Murphy*, 129 F. 148 (C.C.D.R.I. 1904).

"Originality" as defined by this Honorable Court "means only that the work was independently created by the author ... and that it possesses a minimal degree of creativity." *Feist Publications, Inc. v. Rural Telephone Services Co.*, ___ U.S. ___, 111 S.Ct. 1287, 113 L.Ed. 2d 385 (1991). "The

requisite level of creativity is extremely low, even a small amount will suffice. The vast majority of works qualify quite easily, as they posses some creative spark, no matter how crude, humble, or obvious it might be." *Value Group, Inc. v. Mendham Lake Estates, L.P.*, 800 F. Supp. 1232 (D.N.J. 1992) quoting *Feist Publications, Inc. v. Rural Telephone Services Co.*, ___ U.S. ___, 111 S.Ct. 1287, 113 L.Ed. 2d 358 (1991).

"At a minimum, the basic floor plans and general appearance qualify under the latitudinarian standard enunciated by the *Feist* court." *id.* 1232. "Since the standard for originality and therefore copyrightability is so low, copying the floor plan alone infringes the copyright." *id.* 1233.

The Plans are an unpublished work. "The applicability of the fair use doctrine to unpublished works is narrowly limited since,

although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner." Nimmer, *The Law of Copyright*, § 13.05[A] at 13-102.23. "The fact that a work is unpublished is a critical part of it's 'nature.' ... [T]he scope of fair use is narrower with respect to unpublished works." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 564 (1985). "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." *id.* at 555.

> Where use is made of materials of an unpublished nature, the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here. ... Our precedents, then, leave little room for discussion of this factor once it

> has been determined that the copyrighted work is unpublished. *Wright v. Warner Books, Inc.*, 953 F.2d 737 (2d Cir. 1991).

The Court of Appeals erred in finding for the Respondent.

3. Amount and Substantiality of Portions Used.

The Court of Appeals recognizes the Respondents used 100% of the work. "[C]ourts have found that use was not fair where the quoted material formed a substantial percentage of the copyrighted work." *New Era Publications Int'l, ApS v. Carol Publishing Group*, 904 F.2d 152, 158 (2dCir.). *cert. denied*, 498 U.S. 921, 111 S.Ct. 297, 112 L.Ed.2d 251 (1990).

Harper's published approximately 52

> percent of Lish's Letter. In no other reported fair use case that has come to our attention has use of such a large percentage of unpublished expressive material been held to be fair use. *Lish v. Harper's Magazine Foundation*, 807 F.Supp. 1103 (S.D.N.Y. 1992).
>
> Since *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985), the key factor in establishing substantiality of the portion used has been the degree to which the quoted material captures the "heart" of the copyrighted work. *id.* at 1103.

Since the entire copyrighted work was used it is an easy assumption the heart of the work was used. Factor three is in favor of

the Petitioner.

4. The Effect Upon Potential Market.

The fourth factor is "undoubtedly the single most important element of fair use," *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 566 (1985). The Court of Appeals found the use did not materially impair the potential market for the Plans and the Respondents were not direct competitors with Petitioner, so therefore found no effect upon the potential market for the Plans.

"This factor rather poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's present work." Nimmer, *The Law of Copyright*, 13.05[A] at 13-

102.26. "[T]o negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'" *American Geophysical Union v. Texaco Inc.* 802 F.Supp. 20, (S.D.N.Y. 1992) quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 458 (1985), 105 S.Ct. at 2230-31 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S., at 451, 104 S.Ct. at 793) (emphasis added).

The Plans were an unpublished work created to be used to build one, unique house.

> [I]t is clear that the Value Group plaintiffs will also suffer actual irreparable injury if an infringing structure is built in Mendham Lake's competing housing development. ... Once a particular architectural design is utilized in competing

> communities, the viability of that design, and, in fact, of the project itself, becomes doubtful. The public perceives a duplicate design as commonplace and less desirable. *Value Group, Inc. v. Medham Lakes Estates, L.P.*, 800 F.Supp. 1234 (D.N.J. 1992) at 1234.

The use of the Plans to complete the house prevents Petitioner from using his own Plans to build another house in the approximate vicinity.[6] *Value Group* establishes the effect upon the potential market of one unauthorized use of the Plans. One could readily imagine a veritable

---

[6] There are many building lots available within a 1/2 mile radius of both the house Respondents completed and Petitioner's current home. Two lots are adjacent to the house the Respondents completed. These properties hold the same appeal to Petitioner due to their location and proximity to work, school, friends and recreation. For the reasons quoted in *Value Group* Petitioner cannot even use his own works to build a house.

"Levittown" of million dollar homes should the challenged use become widespread.

> Plaintiffs contend that were it not for the photocopying practiced by Texaco's scientists, Texaco would need to provide its scientists additional copies through any one or more of a number of different routes, all of which would substantially supplement the revenues of the copyright owning publishers ... [P]laintiffs have powerfully demonstrated entitlement to prevail as to the fourth factor. *American Geophysical Union v. Texaco Inc.* 802 F.Supp. 18, (S.D.N.Y. 1992).

Petitioner offered the Plans to the Allens. The Allens declined Petitioner's

offer and instead directed Respondents to copy the Plans from Fairfax County via the Freedom of Information Act, directly eliminating a potential sale by the Petitioner. Petitioner is "entitled to the lost fair market value of the architectural plans". *Eales v. Environmental Lifestyles, Inc.* 958 F.2d 880 (9th Cir. 1992) cert. denied ___ U.S. ___ (1992). *See Frank I*, 772 F.2d at 512; *Nucor Corp. v. Tennessee Forging Steel Services, Inc.*, 513 F.2d 151, 153 n. 3 (8th Cir. 1975).

In the case at bar, the application of fair use should be denied. Respondent does not meet the first prong of the test of 17 U.S.C. § 107, that of public good. Respondent also fails each and every of four statutory factors when considering fair use. The Court of Appeals erred in it's decision.

III

Whether the Appellate Court is obliged to reverse a lower court ruling found to be based on false and meritless statements.

In rendering the court's decision the District Court found Respondents entitled to summary judgment based on an implied license to use through the settlement agreement with the Allens because the Plans were required to complete the house. Respondent attested the Plans were needed to complete the house in his affidavit. Petitioner provided the Court of Appeals with evidence, quoting the Virginia Uniform Statewide Building Code, 1987, Section 105.11, that the Plans were not needed to complete the house, therefore no implied license was granted through the settlement agreement.

Petitioner also asked the courts to declare the settlement agreement dealing with

the real property and the copyright claim dealing with intellectual property were unrelated. The courts related the two and created an implied license from the nether. The implied license was the basis for the District Court's decision for the Respondent.[7]

Petitioner asked the Court of Appeals to reverse the finding of the lower court because it relied on false and meritless statements as the basis of it's decision. The Court of Appeals did not address this issue. Petitioner later filed a motion for costs and sanctions based on the false and meritless statements. The Court of Appeals again did not address the false and meritless statements.

---

[7] Petitioner was ready to join the Allens to the case at bar once the court ruled the settlement agreement did not apply. Joining the Allens would affect the computation of the four statutory factors in weighing fair use.

The Court has an obligation to the truth when presented. That obligation requires that when a judicial decision is found to be based on false and meritless statements the decision be overturned. The Court of Appeals for the Fourth Circuit erred when overlooking the false and meritless statements of the Respondent.

IV

Whether the Appellate Court erred in reviewing the case *de novo*.

The District Court for the Fourth District heard Respondents' oral argument on both the applicability of the settlement agreement with the Allens and fair use. The court then allowed the Petitioner to begin oral arguments. The court decided in favor of the Respondents based on the settlement

agreement and stopped the proceedings. Petitioner requested to continue oral arguments on the fair use issue, only to be told the court had ruled, without hearing the Petitioner. *See* APP. 29.

Petitioner appealed to the Court of Appeals for the Fourth Circuit on the basis of the false and meritless affidavit filed by the Respondent. Fair use was not a finding of the District Court and therefore not addressed in the appeal.

The Court of Appeals did not rule on the merits of the applicability of the settlement agreement, but decided the question of fair use *de novo* relying on the record. By doing so the Court of Appeals for the Fourth Circuit denied Petitioner his "day in court" on the issue of fair use.

The Court of Appeals for the Fourth

Circuit erred in relying on the record where Petitioner was denied the right to enter relevant oral arguments into the record.

V

Whether the Court of Appeals for the Fourth Circuit erred in issuing an order in conflict with recent rulings by the United States Court of Appeals for the Third, Sixth and Ninth Circuit.

This writ of certiorari quotes a large body of case law in support of the arguments propounded. Petitioner respectfully submits that the Courts of Appeals for the New York area, the Ninth Circuit (Los Angeles), and the Sixth Circuit (Nashville) because of the geographic concentration of the film, television, and music industries, play a far

more significant role in determining precedent of copyright law. Petitioner brings special attention to three recent decisions from these courts.

Eales v. Environmental Lifestyles, Inc., 958 F.2d 876 (9th Cir. 1992).

This case is identical to the case at bar except for the final judgment. Defendant was not a builder by trade, rather a landscape architect like Respondents. Defendant copied architectural plans from the county to obtain building permits to complete an unfinished house. Plaintiff discovered the copying, registered the copyright, sent an invoice and followed with suit. Copyright infringement was found and Plaintiff was awarded damages. The ruling was affirmed in the Court of Appeals for the Ninth Circuit and affirmed again by this Honorable Court by denial of defendants writ of certiorari.

Value Group, Inc. v. Mendham Lake Estates, L.P., 800 F.Supp 1228 (D.N.J. 1992).

In this case both parties are builders. Defendant enticed a home buyer to copy the architectural plans of Plaintiff for the purposes of building a house in Defendant's development. Plaintiff discovered the use after the plans had been filed with the county by Defendant. Plaintiff filed suit for copyright infringement and injunction. The court found for the Plaintiff deciding even a single use of architectural plans has a detrimental effect on potential market.

Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1492 (6th Cir. 1992), *cert. granted*, ___ U.S. ___ (1992).

Defendants copied music of Plaintiff's for parody. The lower court found for the

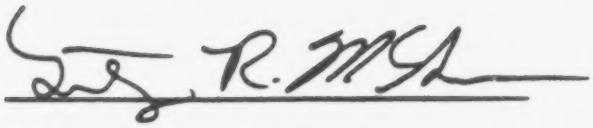
Defendants. The Court of Appeals for the Sixth Circuit found the use was not fair and reversed the lower court. This case has been accepted by this Honorable Court for hearing.

The Court of Appeals for the Fourth Circuit erred in finding fair use in the case at bar. The Court of Appeals for the Fourth Circuit is in conflict with 152 years of fair use case law, legislation and the recent cases cited above.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



Timothy R. McGowan, pro se

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Timothy R. McGowan,

Plaintiff-Appellant,

No. 92-1480

Mark J. Cross; CROSS, CLAYTON & ASSOCIATES

Defendants-Appellees.

Timothy R. McGowan,

Plaintiff-Appellee,

No. 92-1584

Mark J. Cross; CROSS, CLAYTON & ASSOCIATES

Defendants-Appellants.

APP. 2

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.

Albert V. Bryan, Jr., Senior District Judge.

(CA-91 - 1774-A)

Submitted: April 8, 1993

Decided: April 22, 1993

Before PHILLIPS and HAMILTON, Circuit Judges, and

BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Timothy R. McGowan, Appellant Pro Se. Mark J.

Cross, Clifton,
Virginia; Cross, Clayton & Associates, Clifton, Virginia, Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

In No. 92-1480, Timothy McGowan appeals the district court's decision awarding summary judgment to Defendants Mark Cross and Cross, Clayton & Associates in a copyright infringement action. In No. 92-1584, Defendants appeal the district court's denial of their motion for sanctions. We affirm the decision in each

Case.[1]

I.

This lawsuit has its roots in a dispute between McGowan and his wife and Wendy and Edwin Allen over a parcel of land in Fairfax County, Virginia, which each couple thought it had purchased. The McGowans prevailed in state

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[1] We note that Cross, Clayton & Associates is not represented by counsel on appeal. Mark Cross, who is proceeding pro se as a named party in both appeals, seeks also to represent Cross, Clayton & Associates in each appeal. Corporations and partnerships, as artificial entities, may not appear pro se but must instead appear through counsel. *See* Fed. R. App. 4(a); *Eagle Assoc. v. Bank of Montreal*, 926 F.2d 1305 (2d Cir. 1991); *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

We accordingly grant McGowan's "Request to Take Notice" that Cross, Clayton & Associates is not represented by counsel on appeal, dismiss No. 92-1584 as to Cross, Clayton & Associates, and strike the brief of Cross, Clayton & Associates in No. 92-1480. This decision does not affect the right of Mark Cross to appear pro se in each appeal or on his own behalf.

trial court. They purchased a copyrighted house plan, made twenty modifications to the plan, and began construction of a house on the land.

The Allens prevailed on appeal. *Allen v. Lindstrom*, 379 S.E.2d 450, 455 (Va. 1989). The property was conveyed to the Allens by court order on September 11, 1989. The Allens then completed construction of the house begun by the McGowans. Defendant Mark Cross, a landscape architect and relative of the Allens, assisted, using the McGowan plan on file with Fairfax County. Cross applied for and received a building permit based on the plan. On or before November 2, 1989, Cross made several copies of the plan in order to obtain required permits and to complete the dwelling. At that time, McGowan had not received a copyright on the modified plan, and there was no notice on file with Fairfax County that a copyright was claimed.

In May 1990 the Allens and the McGowans

entered into a settlement agreement which provided that the Allens would pay the McGowans for the property, including improvements made on the property. The agreement contained a clause providing that the McGowans would not interfere in any way with the Allens' work on their house.

Following a series of letters to the Allens, McGowan filed this action, alleging copyright infringement by Cross and his firm. McGowan claimed that on January 8, 1990, he created and obtained a valid copyright for original works, his modifications to the original house plan. He asserted that the works were for his private use and enjoyment and were unpublished. He claimed that Cross had made twelve copies of the drawings and sought, among other things, royalties of $ 1,200,000.

Defendants moved for summary judgment McGowan countered with his own motion. Following a

hearing, the court noted that it was not convinced that the minor alterations to the original plan were entitled to copyright protection. However, the court rested its decision to grant Defendants' motion on the finding that the settlement agreement gave the Allens an implied, non-exclusive license to complete the house and for their agents to use the plans in accomplishing the task and that Defendants' use of the plans constituted a fair use. In No. 92-1480, McGowan appeals this decision. In No. 92-1584, Defendants appeal the denial of their motion for sanctions, costs, and attorney's fees.

II.

We review the district court's award of summary judgment *de novo*. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1127-28 (4th Cir. 1987). Assuming without deciding that the copyright was entitled to protection under the

copyright laws, we agree with the district court that the fair use doctrine entitled the Allens or their agent, Cross, to use the plan without violating the copyright laws.[2]

"Any individual may reproduce a copyrighted work for a 'fair use'; the copyright owner does not possess the exclusive right to such a use." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984). This principle is embodied in the Copyright Act: "the fair use of a copyrighted work ... is not an infringement of copyright" 17 U.S.C.A. § 107 (West Supp. 1992). This statute sets for the four factors to be considered when deciding whether a particular use constitutes a "fair" use:

(1) the purpose and character of the use, including whether such use is

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[2]Having resolved this issue in favor of Defendants, we do not discuss the alternative finding that defendants possessed a nonexclusive license.

of a commercial nature or is for nonprofit purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. These factors are not exclusive, but are "particularly relevant to the fair use questions." *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986), cert. denied, 55 U.S.L.W. 3776 (1987).

In this case, Cross did not intend the

modified plan to be used for commercial purposes. Rather, Cross reproduced the plan solely so that the house could be completed. "The crux of the profit/non-profit distinction is ... whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

With respect to the second factor, McGowan made twenty fairly insignificant changes to the original plan, including the substitution materials and replacement of windows. This modified plan constituted "a work more of diligence than of originality or inventiveness," *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F.Supp. 217, 221 (D.NJ. 1977), and therefore was more factual than creative in nature. The second factor thus weighs in favor of Cross. *See* 2 P. Goldstein, *Copyright*

§ 10.2.2.2 at 226 (1988). By contrast, the third factor weighs in favor of McGowan because the modified plan was copied in its entirety.

The fourth factor is "undoubtedly the single most important element of fair use," *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. at 566. "A use which does not materially impair the marketability of the copyrighted work will be deemed f." *N.A.D.A. Servs. Corp. v. Business Data of Va., Inc.*, 651 F.Supp. 44, 48 (E.D. Va. 1986). Typically, an adverse effect on market value is most clearly shown in cases where the plaintiffs and defendants compete or where the defendant's use is of a manner and type which the plaintiff has previously licensed. *See* 2 Goldstein *Copyright* § 10.2.2.4 at 233-34.

Neither factual situation is present in the

subject case. The copying of the plan was for the sole purpose of completing the house. There has never been any suggestion of an attempt to compete with McGowan by marketing his plan.

We conclude that the statutory factors weight in favor of Defendants and that copying the modified house plan was a fair use of the plans under the copyright laws.

III.

Defendants moved for imposition of sanctions, costs, and attorney' s fees. They claimed entitlement under Fed. R. Civ. P. 11, 28 U.S.C. § 1927 (1988), the American Rule, and 17 U.S.C. § 505 (1988). The district court denied the motion with the following order:

The defendant's motion is DENIED, the

> court finding insufficient abuse on the part of the plaintiff so as to warrant imposition of Rule 11 sanctions; being unwilling in its discretion to award attorneys fees as part of costs pursuant to 17 U.S.C. §505; and not being persuaded that costs were multiplied unreasonably and vexatiously as contemplated by 28 U.S.C. § 1927, or that there was sufficient evidence of bad faith so as to warrant otherwise an award of attorney's fees.

This Court reviews the district Court's decision for an abuse of discretion. *See Cooter & Gell v. Harimarx Corp.*, 496 U.S. 384 (1990); *Harris v. Emus Records Corp.*, 734 F.2d 1329 (9th Cir. 1984); *Miltier v. Beorn*, 896 F.2d 848, 855 (4th Cir. 1990); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

We hold that the district court did not abuse its discretion in denying the sanctions request.

IV.

Accordingly, we affirm the decision of the district court in both appeals. We dispense with oral argument because our review of the record and other materials before us reveals that argument would not aid the decisional process.

AFFIRMED

APP. 15

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

May 18, 1993

No. 92-1480

CA-91-1774-A

TIMOTHY R. MCGOWAN

Plaintiff - Appellant

v.

MARK J. CROSS; CROSS, CLAYTON & ASSOCIATES

Defendants - Appellees

No. 92-1584

CA-91-1774-A

TIMOTHY R. MCGOWAN

Plaintiff - Appellee

v.

MARK J. CROSS; CROSS, CLAYTON & ASSOCIATES

Defendants - Appellants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

Bert M. Montague

CLERK

APP. 18

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED:

May 21, 1993

92-1480

(CA-91-1774-A)

TIMOTHY R. MCGOWAN

Plaintiff - Appellant

MARK J. CROSS; CROSS, CLAYTON & ASSOCIATES

Defendants - Appellees

APP. 19

92-1584

(CA-91-1774-A)

TIMOTHY R. MCGOWAN

Plaintiff - Appellee

MARK J. CROSS; CROSS, CLAYTON & ASSOCIATES

Defendants - Appellants

The appellant/cross-appellee has filed a motion for award of costs and sanctions under Rule 56(g) of the Federal Rules of Appellate Procedure.

The Court denies appellant/cross-appellee's motion for award of costs and sanctions and, to the extent that the motion can be construed as a request for imposition of costs on appeal, the Court denies this request as well.

Entered at the direction of Judge Hamilton with the concurrence of Jude Phillips and Senior Judge Butzner.

For the Court

Bert M. Montague

Clerk

APP. 21

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

May 25, 1993

No.92-1480

CA-91-1774-A

McGowan v. Cross

No.92-1584

CA-91-1774-A

McGowan v. Cross

MANDATE

The judgment of this Court dated 4/22/93 takes effect today.

BERT M. MONTAGUE

CLERK OF COURTS

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

TIMOTHY R. McGOWAN,

Plaintiff,

-vs-

CIVILACTION

NO. 91-1774-A

MARK J. CROSS, et al.,

Defendants.

Friday, March 27, 1992

Alexandria, Virginia

Transcript of motion proceedings in the above captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR.,
Judge United States District Court

APPEARANCES:

TIMOTHY R. McGOWAN, Pro se

FOR THE DEFENDANTS:

THOMAS O'BRIEN, ESQUIRE
MICHAEL CLAYTON, ESQUIRE
OF:
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D. C. 20036

PROCEEDINGS

THE CLERK: Civil Action No. 91-1774-A, Timothy R.

McGowan vs. Mark J. Cross, et al.

THE COURT. This comes on cross motions for summary judgment.

(ARGUMENTS OF THE PLAINTIFF AND DEFENDANT'S ATTORNEYS ARE DELETED. BELOW ARE THE RULINGS OF THE COURT TRANSCRIBED VERBATIM.)

THE COURT: It seems to me that the background of the case -- I don't need to hear any more argument -- the importance. The genesis of this disagreement that is manifested by the present law action began with a dispute between this plaintiff and

the Allens over a tract of land.

The plaintiff, Mr. McGowan, prevailed at the trial level in the State Court, and the trial Court awarded him the land.

He thereupon began constructing a house on it. The house, the plans for which are here at issue, the Court of Appeals, or the Supreme Court of Virginia, reversed the trial Court. The result of which was the Allens now have the land, but Mr. McGowan had a half, or partially-completed house on the land. So the Allens and Mr. McGowan resolved that by settling their dispute so that for $120,000 the Allens got all the McGowan interest in the house. They then had a partially-completed house. They got the defendant in this case, Cross, who is an engineer, not an architect, who went and got through the county copies of the plans that were filed

with the county, and he made copies of those so he could complete the house and apparently did complete the house. Shortly after the settlement with the Allens, this plaintiff obtained copyright registration issued by the copyright office for these plans as he had modified them, and it is the modified plans which have been copyrighted by him or registration issued, that he contends his copyright rights were violated when the engineer's calls to the defendant here made copies of the plans in order to complete the house for the Allens.

I am not satisfied that the changes were all that substantial, but that's not the basis upon which I think the defendant is entitled to a summary judgment.

There was certainly at the very least a, the implication of a nonexclusive license

in order to carry out the terms of the contract that this plaintiff had made with the Allens. It was surely contemplated that they would need the plans which were on file at the county in order to complete the house, and certainly the plaintiff impliedly gave them or their engineer the right to use those plans. To call that a copyright infringement it seems to me just stands the copyright law on its head

As I say, there is some serious question about the substantiality of any modifications that were made and whether as a derivative work, but the real reason I think that it would be manifestly unjust for this Court to award this plaintiff copyright relief in view of the circumstances under which the Allens, through the defendant Cross got the plans, I am unwilling to do it.

On that basis, whether you call it a nonexclusive right or whether you call it fair use, in either event, and indeed in both events, the defendants are entitled to use these copies for the purpose that the plaintiff surely contemplated they would be used when he settled with the Allens.

For these reasons, the defendants' motion for summary judgment is granted. The plaintiff's motion for summary judgment is denied.

MR. McGOWAN: Your Honor, may I address the Court?

THE COURT: I have ruled.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

APP. 30

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

TIMOTHY R. McGOWAN,

Plaintiff,

-vs-

CIVILACTION

NO. 91-1774-A

MARK J. CROSS, et al.,

Defendants.

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the defendants for

summary judgment is granted.

2. The motion of the plaintiff for summary judgment is denied.

3. This action is dismissed.

_____

United States District Judge

Alexandria, Virginia

March 27th, 1992